No. 5827

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FERRIS, FREDDIE MARINO and FRANK FINNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING AND FORMAL APPPLICATION FOR STAY OF MANDATE.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Frank H. Rudkin, and to the Honorable Frank S. Dietrich, and to the Honorable Curtis D. Wilbur, Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Frank H. Norcross, District Judge, sitting as Judge of said Circuit Court:

The petition of appellants for a rehearing of the above entitled cause, respectfully shows:

Two questions presented by this appeal were decided by Your Honorable Court adverse to these appellants, each of which, appellants respectfully contend, is erroneous:

First: The decision of your Honorable Court decides adversely to appellants their contention that "it was error to admit testimony concerning the con-

duct of defendants Sanchez and Wilson following their arrest, which conduct was not in the presence of appellants.

Second: The decision of your Honorable Court decides adversely to appellants their contention referred to in the opinion in the following language: "It is contended that the Court erred in admitting in evidence the testimony concerning the proximity of places along the coastline where small boats could be landed."

FIRST.

IT IS URGED THAT IT WAS ERROR TO ADMIT TESTIMONY CONCERNING THE CONDUCT OF THE DEFENDANTS SANCHEZ AND WILSON FOLLOWING THEIR ARREST WHICH CONDUCT WAS NOT IN THE PRESENCE OF APPELLANTS.

The foregoing is the language of your Honorable Court and correctly states the legal proposition involved.

No question arising in the trial of a conspiracy case is fraught with more difficulty than the question of admissibility of the acts or declarations of a co-conspirator outside the presence of a defendant on trial. Trial Courts in this district have consistently held that the conspiracy ends with the arrest of the conspirator. In the case at bar, the witness Shulte was about to narrate statements made by Sanchez and Wilson. Thereupon the following objection was made, and the following ruling was had:

> "Mr. FAULKNER. Before any reply is given to that we wish to object to any statements made by Sanchez or Wilson out of the presence of the

parties here on the ground it is hearsay and the proper foundation has not been laid and any conspiracy, if any existed, has terminated.

"The COURT. *Yes, nothing in relation to these other defendants,* if they said anything, you don't assume they did, as a matter of fact you don't assume they said anything about the other defendants?"

The conduct of the defendants Sanchez and Wilson recited by the witnesses on behalf of the government occurred after the truck which they had been driving had been overtaken and stopped by the sheriff and his deputy, the defendants Sanchez and Wilson requested to step down from the truck, and *after Sanchez and Wilson had been handcuffed together.* (R. 30.) Under these circumstances, your Honorable Court has ruled upon the admissibility of evidence of their conduct as follows:

"However, in the case at bar we are of the opinion the conspiracy was not terminated even as to Sanchez and Wilson upon their arrest. *The object of the conspiracy was the successful transportation of contraband liquor.* The means adopted to carry that object into execution was the *actual transportation by defendants* Sanchez and Wilson driving and accompanying the loaded auto truck under the convoy of appellants equipped with a machine gun and Colt revolver. Until the convoy was hors de combat by the arrest of appellants the conspiracy was not terminated as to any of its participants."

It is respectfully urged that this ruling, upon analysis, is erroneous. In Carson's "The Law of Criminal Conspiracies and Agreements," a part of Wright's "Criminal Conspiracies," pages 212 and 213, it lays down a rule that the admission of evidence

concerning the acts or declarations of co-conspirators in the following precise language:

> "It is upon this principle of a common design that the acts and declarations of co-conspirator, and acts done at different times and by different individuals are admitted in evidence against those prosecuted, as whatever is said or done by any one of the number, in furtherance of the common design becomes a part of the *res gestae,* and is the act of saying of all. * * * *Care must be taken, however, to limit the evidence to acts and declarations done and made while the conspiracy was pending, and in furtherance of the design;* they must be concomitant with the principal act, and so connected with it as to constitute a part of the *res gestae.* Detached acts, or stray statements, or loose admissions made by one, either before the conspiracy was formed, or after it had been consummated, would not be admissible, unless, in some conclusive way, brought home to two or more of the defendants. It is the principle of *agency,* which, when once established, binds the conspirators together, and makes them mutually responsible for the acts and declarations of each."

In discussing the admissibility of acts or declarations by co-conspirators, 3 *Greenleaf Evidence,* Section 94, declares as follows:

> "And here, also, as in those cases the evidence of what was said and done by the other conspirators *must* be limited to the acts and declarations made and done while the conspiracy was pending and *in furtherance of the design;* what was said or done by them before or afterwards not being within the principle of admissibility."

It is to be borne in mind in passing that the admission of this type of evidence is an exception to the general rule that it is hearsay and as such exception should be strictly construed.

In *State v. Larkin,* 49 N. H. 44, we find this language:

> "But this proposition is to be received, subject, *always* to the limitation that the acts or declarations admitted by those, only, which were made and done during the pendency of the criminal enterprise and in furtherance of the criminal object."

In the case of *Patton v. State,* 6 Ohio St. 467, the conspiracy charged was a fraudulent combination between Patton and Arnold in obtaining a contract for rebuilding a bridge. A witness testified Arnold made certain declarations implicating Patton in the fraudulent enterprise at or about and on the same day the money for the bridge was paid. The Court held:

> "Whether the conspiracy shall be deemed to have continued until the money was actually paid Arnold or not, or whether the latter declarations were made before or after he actually received either the order or the money, seem wholly immaterial. In any case, it cannot be claimed that the declarations of Arnold to Hilts were made in furtherance of the unlawful enterprise or accompanied any act done in accomplishment of the common design."

In the case at bar, your Honorable Court has declared the conspiracy was not terminated at the time of the arrest of Sanchez and Wilson. Yet in the very next sentence, your Honorable Court declares the object of the conspiracy was the successful transportation of contraband liquor. *The object of this conspiracy was completely terminated.* The liquor had been seized, was in the custody of the peace officers of the State of California, and the men were handcuffed. Your Honorable Court next declares

that the role played by Sanchez and Wilson in this conspiracy was to actually transport the liquor. Their participation had physically and definitely and positively ended.

We respectfully urge that the principles of law laid down repeatedly and consistently in the cases supported by the text writers is modified by your Honorable Court's opinion to the extent that it is actually destroyed when your Honorable Court declared:

> "Until the convoy was hors de combat by the arrest of appellants the conspiracy was not terminated as to any of its participants."

The danger of this principle as a law of evidence in this Circuit is apparent when it is considered that it is not qualified in any way and that if the rule is good for five minutes after the arrest of Sanchez and Wilson, it is good for five days after their arrest.

Your Honorable Court in its opinion refers approvingly to the language of the Supreme Court of the United States in the case of *Logan v. United States,* 144 U. S. 263, at 308. Under the very case cited by your Honorable Court, the acts or declarations of Sanchez and Wilson were clearly inadmissible for therein said Court, in addition to the language repeated verbatim in your opinion, declares as follows:

> "After the conspiracy has come to an end, whether by success *or by failure*, the admissions of one of the participants by way of narrative of past facts, are not admissible in evidence against the others."

If the object of this conspiracy was the successful transportation of contraband liquor, it had failed

when the liquor had been taken possession of by the peace officers of the State and the drivers of the truck removed therefrom and actually handcuffed.

Further, the conduct of Sanchez and Wilson depicted in the Record as follows:

> "The WITNESS. We handcuffed them together and in a matter of two minutes——
>
> Mr. SHEETS. What was their action at that time?
>
> A. Very nervous.
>
> The WITNESS. After being handcuffed together they had got pretty well forward, they kept edging back toward the rear of the truck, there was about fifteen steps between the car and the place where they had been, they kept watching down the road, the way they had come.
>
> The WITNESS. They edged around the back of the truck. I ordered them back a couple of times and about the time they got back I looked down the road. They got back clear to the right-hand corner of the truck, then I ordered them back again, that is right to the left rear corner of the truck, by the road alongside of the truck."

was not and is not an act of Sanchez and Wilson in furtherance of the common design which is set forth in your Honorable Court's opinion as the successful transportation of contraband liquor.

The rule laid down by your Honorable Court justifying the admission of the acts of Sanchez and Wilson renders erroneous the rule of the trial judge that their declarations were inadmissible. If Sanchez and Wilson had engaged the peace officers arresting them in conversation after they had been arrested and handcuffed, we feel certain that your Honorable Court, without hesitation, would have declared that the conversations were not admissible because they

were no longer talking as agents of an enterprise, but were speaking in their own behalf because of their altered conditions resulting from their arrest, and your ruling would have been that nothing they could have said under those circumstances out of the presence of these appellants could bind them. If this be true, there can be no distinction between an act and a declaration. Each must occur while the conspiracy is pending and be made or done in furtherance of its object.

There is no element in this of a conspiracy with a dual object, one of which is accomplished and another unfulfilled, as for instance, a conspiracy to steal money and to divide the profits of the theft, in which latter type case, the conspiracy is deemed to exist until the division of the proceeds.

This principle inartificially expressed by the writer of this brief, is well expressed by the Supreme Court of the State of California in the case of *People v. Opie,* 123 Cal. 294, at page 296:

> "William Opie and Edward Opie were jointly charged. William Opie was upon trial. Conceding the evidence established a conspiracy between these two parties to commit the crime of grand larceny, still the court committed error in allowing evidence to be introduced as to the appearance, the conduct and the declarations of Edward Opie, the defendant, not upon trial. It is elementary law that such evidence as to a coconspirator not upon trial partakes of the character of pure hearsay. This evidence was all directed toward matters occurring after the commission of the offense—after the conspiracy was accomplished and ended. There is not even the excuse for its admisison that the defendant on trial was present at the time. This court has

had occasion many times, and recently, to advert to the error of similar judicial action. (People v. Moore, 45 Cal. 19; People v. Dilwood, 94 Cal. 89; People v. Oldham, 111 Cal. 652.) Without question it may be said that this evidence was extremely prejudicial to defendant, and its admission demands a new trial of the case. The attorney general attempts to meet the force of these objections by saying that the conspiracy was not ended when the events occurred which this evidence disclosed. It is said the conspiracy was not ended because the property stolen had not yet been distributed between the thieves. This is no answer, for there is no evidence disclosing that it had not been distributed at the time; and again, there is no evidence that it was ever intended that it should be distributed. In certain cases where the conspiracy discloses an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place any time prior to the division are admitted. This is upon the theory that the conspiracy does not end until that time. The present case discloses nothing of that kind."

Your Honorable Court has relied upon the ruling of the Supreme Court in the *Logan* case, supra. There was far more reason to have declared the conspiracy there claimed to have existed, to have still been in existence at the time of the making of the statements by Johnson, than in the case at bar.

In the *Logan* case, the crime charged was a conspiracy to injure and oppress certain men in the custody of the United States marshal, which crime resulted in numerous indictments which are reviewed in the opinion. You will note that the Supreme Court held the conspiracy ended when the mob was actually dispersed, on the 19th of January, 1889, when two of

the Marlows mentioned in the opinion were killed. On the night of January 19th, Johnson was supposed to have made certain declarations that Logan, one of the appellants and a co-conspirator was present, at the raid on the prisoners. The Supreme Court could well have said, if all parties to the conspiracy should be rendered *hors de combat,* that the conspiracy still existed, because the opinion discloses that on the day following the 19th, Collier, one of the conspirators and another large body of men collected at the Denson farm to again capture the surviving Marlows.

In the light of the facts in the *Logan* case, it is respectfully urged that your Honorable Court has departed from rather than followed the rule in the *Logan* case.

Counsel has been diligent in his examination of authorities on this subject. Nowhere has he been able to find authority for the proposition set forth in the opinion of your Honorable Court that all parties to the conspiracy must be *hors de combat* before acts or declarations of arrested conspirators are deemed inadmissible.

SECOND.

IT IS CONTENDED THAT THE COURT ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY CONCERNING THE PROXIMITY OF PLACES ALONG THE COAST LINE WHERE SMALL BOATS COULD BE LANDED.

In disposing of this contention, your Honorable Court uses the following language:

> "It is contended that the court erred in admitting in evidence the testimony concerning the

proximity of places along the coast line where small boats could be landed. It is clear, we think, error was not committed in the admission of this testimony. We have here as an established fact a truck upon a highway within a few miles of the coast line carrying a very considerable load of contraband liquors bearing foreign labels. The amount and character of the merchandise is readily suggestive of its unlawful entry by boat at some convenient coast point. Under such circumstances the jury is entitled to consider the topography of the adjacent country in connection with other facts and circumstances established in the case."

In the case of *Niederluecke v. United States,* 21 Fed. (2d) 511, the Court declared:

> "But these presumptions are too violent and irrational to sustain a conviction of a serious offense, and the permissible basis of a presumption must be a fact and *one presumption may not be the basis of another presumption.*" Wagner v. U. S. (C. C. A.), 8 Fed. (2d) 581, 586, and cases there cited."

Your Honorable Court has recently in the case of *Sturdevant v. United States,* 36 Fed. (2d) 562, definitely and positively laid down the rule that one inference will not support another inference. Your specific language in the *Sturdevant* case is as follows:

> "The jury might perhaps infer from the testimony that the cargo was stolen or embezzled by the appellants, for this would be only a reasonable inference from the facts and circumstances in the case, but such an inference, based on circumstantial evidence alone, will not support the further inference that the motorboat was cast away or destroyed in order to conceal the theft or embezzlement, because the rule is well settled that one inference will not support another. The

> theft or embezzlement of the cargo might, no doubt, disclose a motive for the destruction of the motorboat, but a person cannot be convicted of a crime on motive and theory alone, however plausible the theory may be, without other or further support in the evidence."

In the case at bar your opinion declares that because the truckload of liquor bore foreign labels, it is readily suggestive of unlawful entry by boat at some convenient coast point. When your Honorable Court used the term "readily suggestive," it was another expression to say a reasonable inference. Based upon that inference, your Honorable Court has in this case approved the admission of evidence, not that liquor was being landed in the vicinity of the seizure of this truck, but that *small boats* were capable of landing. Upon the inference that this is smuggled liquor, your Honorable Court has permitted the further inference to be drawn that it was smuggled in the vicinity of the place of the seizure of the truck, and from these inferences, one bottomed on the other, the Court has permitted a still further inference that these defendants participated in the actual smuggling of the liquor.

It is respectfully urged that in so doing your Honorable Court has departed from the rule in this Circuit laid down in the *Sturdevant* case, and that the facts in this case cannot be legally distinguished therefrom.

CONCLUSION.

It is respectfully urged that this petition be granted.

Dated, San Francisco,
June 11, 1930.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 11, 1930.

HAROLD C. FAULKNER,
Of Counsel for Appellants and Petitioners.

FORMAL APPLICATION FOR STAY OF ISSUANCE OF MANDATE

for the Purpose of Applying to the Supreme Court of the United States for the Issuance of a Writ of Certiorari.

Counsel for appellants herein heretofore in open Court applied for a stay of the mandate in order to file a petition for a writ of certiorari in the Supreme Court of the United States. This application was by your Honorable Court denied.

Counsel for the appellants respectfully applies for a stay of mandate in the within cause in case this petition for rehearing is denied.

In support of the application, appellants respectfully urge that the foregoing petition and their brief on file herein are in the judgment of counsel for appellants meritorious and filed in good faith. That among other things a proper question for review by the Supreme Court of the United States is presented in this: That your Honorable Court has in the case at bar failed to follow the law of evidence as expounded by the Supreme Court of the United States in the *Logan* case, supra.

Wherefore, appellants pray that in the event of a denial of their petition, mandate be stayed for a period of thirty days or such other reasonable time as the Court may deem fit and proper in order that

they may file and docket in the Supreme Court of the United States a petition for writ of certiorari.

Dated, San Francisco,
June 11, 1930.

JAMES B. O'CONNOR,
HAROLD C. FAULKNER,
Attorneys for Appellants and Petitioners.